



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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NO. PD-0424-19

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LARRY THOMAS CHAMBERS, JR., Appellant

v.

THE STATE OF TEXAS

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ON STATE'S MOTION FOR REHEARING

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**KELLER, P.J., filed a dissenting opinion.**

I would grant rehearing. I would hold that Appellant failed to raise a fact issue about whether the officer had reasonable suspicion regarding the proper illumination of a license plate or tag. There was no testimony that there was proper illumination, and the videos are unclear about the matter. If Appellant were being tried for violating the traffic laws pertaining to having a properly illuminated license tag, the videos would provide some evidence that he did not violate the law. But the videos do not provide evidence that the officer *lacked reasonable suspicion* about the matter.

On direct examination, the officer testified about whether there was a white light illuminating a license plate or tag on the rear of the vehicle. He said he did not see one:

**CHAMBERS REHEARING DISSENT — 2**

Q. And if they are, is there a requirement that those be lighted and visible?

A. Yes, sir.

Q. And what's that requirement?

A. They have to be visible from 50 feet.

Q. Through what type of light? Is there a color?

A. White light.

Q. Throughout the u-turn that we recently watched in this clip of the video, were the defendant's brakes applied?

A. Yes

Q. And what color light was illuminated at that point?

A. Red.

Q. Did that red light allow you to see the license plate anywhere?

A. No.

On cross-examination, defense counsel tried to get the officer to testify that there was a white light but he could not get the officer to agree:

Q. If I remember your testimony, you said that you didn't see a white light on the back of the pickup; is that correct? Is that your testimony?

A. I don't recall one.

Q. So is there a difference between "I don't recall" and "I didn't see one" in your mind?

A. In my mind, I did not see one.

\* \* \*

Q. What I seem to see right here is I seem to see a white light under the red lights on this pickup. Do you recall seeing that?

A. I don't recall seeing that, sir.

\* \* \*

Q. Do you recall looking at the pickup and whether or not there was a lighted -- a light on the -- the plate whenever you stopped him?

A. I don't recall seeing one on there.

\* \* \*

Q. Your body camera -- What I see is I see some red lights where the taillights are. They're not on brake lights, but they are illuminated red and then a white light under it. Does that appear to be what it is?

A. It's pretty blurry, sir. I can't really tell from this point.

Q. There's not anybody -- no one else's lights are shining at the back of the vehicle, are they?

A. Mine are.

Photos taken after the truck was impounded show that there was in fact a temporary license tag on the truck below the left taillight. The tag is worn and tattered, and part of the area behind the tag is visible. That visible area appears to be silver or white, and is lighter than the otherwise black truck. Two of the impound photos show a light above the left brake lights being lit, but it is unclear from the photos whether the license-tag area is lit, and a light bulb cannot be seen.

A number of places on the officer's dashcam video show a square or rectangular area below the left taillight that is much lighter than the corresponding area below the right taillight. A still photo from the dashcam video shows one instance of this. A brief portion of the bodycam video shows this as well. It cannot be determined from the videos or the still photo, however, whether that is due to a light illuminating the temporary tag or whether it is due to the whiteness of the tag, the lightness of the area behind the tag, or light reflecting off the temporary tag or the area behind it.

The Court says the white light is most noticeable during 0:29-0:34 of the dashcam video. A jagged bright spot can be seen in the area we now know was occupied by the temporary tag. That jagged bright spot might be a light, but it is not clear that it is. It could be a reflection of another light on the roadway. The officer was following the vehicle, there were other vehicles on the road, and there were traffic lights and street lamps. Or it could be due to coloring behind the temporary tag. Or it could be some other visual artifact of the video. Some examples of visual artifacts can be seen throughout the video, such as the fact that, at times, the taillights seem to be different levels of brightness. It simply cannot be said for certain that this bright jagged area was in fact a separate light illuminating the tag. On the video from the officer's bodycam taken after the stop, it does look like there is a light illuminating the tag but, again, the light might have come from somewhere else.

As we explained on original submission, the evidence about the basis for the stop must be “affirmatively contested” to raise a fact issue.<sup>1</sup> Videos that suggest only that there might have been a white light illuminating the temporary tag do not affirmatively contest a police officer's testimony that he did not see a light. A video showing that there might have been a light illuminating the tag is, at most, equivalent to a witness testifying only that there might have been a light illuminating the tag. We would not consider such testimony to create a disputed fact issue.<sup>2</sup>

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<sup>1</sup> *Chambers v. State*, PD-0424-19, 2022 Tex. Crim. App. LEXIS 221, \*4 (Tex. Crim. App. April 6, 2022). *See also Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007).

<sup>2</sup> *See Madden, supra* at 513-14 (“If, however, Officer Lily says that appellant did speed, and Witness Two (or appellant) says that he doesn’t remember or doesn’t know, there is no disputed fact to submit because there is no affirmative evidence of a factual conflict. Similarly, if Officer Lily testifies that appellant did speed, but the cross-examiner grills him, ‘Isn’t it true that he really did obey the speed limit, you’re wrong or you’re lying?’ there is no factual dispute unless Officer Lily admits, ‘Yes, that is true.’ . . . There must be some affirmative evidence of ‘did not speed’ in the record before there is a disputed fact issue.”).

## CHAMBERS REHEARING DISSENT — 5

It is not clear to me that a video or photo can substitute for testimony about a fact so as to raise a disputed fact issue for Article 38.23 purposes. The idea of appellate court judges scrutinizing photos and watching and re-watching videos of events that an officer saw once, in real time, in order to decide whether they raise a disputed fact issue seems like the wrong way to address whether a trial court erred in refusing an instruction when there is no testimony contesting the issue.<sup>3</sup>

But even if video or photo evidence can substitute for testimony, for the video and photo evidence to affirmatively contest the officer's statement that he did not see a white illuminating light, that evidence needs to show that there was in fact such a light. This is unlike the issue we addressed on original submission, where the videos and photo evidence showed definitively that there was in fact a license tag on the truck<sup>4</sup> and there was testimony that there was a license tag. If the temporary tag was properly illuminated, then someone could have testified to that fact. But there was no testimony that the tag was properly illuminated, and the video and photo evidence does not show definitively that it was.

I conclude that Appellant did not provide evidence affirmatively contesting the officer's testimony that he did not see a white illuminating light, and so there was no disputed fact issue about whether the officer had reasonable suspicion regarding the existence of proper illumination. Because

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<sup>3</sup> See *Jaganathan v. State*, 479 S.W.3d 244, 248 (Tex. Crim. App. 2015) (“[T]here is a difference between what an officer sees during an ongoing event and what we see when reviewing a video. After watching the video many times, with the ability to stop the action and enlarge the image, we can say with some degree of confidence which cars were where, who was going faster than whom, and how the events transpired. . . . We would be much closer to knowing what the officer observed if we were to view the video only one time, from start to finish, without stopping. But even then, we might not focus on what the officer focused on at the time of the stop.”).

<sup>4</sup> See *Chambers*, *supra* at \*5 (“Appellant proved the evidence on the fact issue was affirmatively contested. Here, the dashcam video and still photographs depicting a license plate affirmatively contest the officer's claim that he could not see a license plate.”).

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the officer having reasonable suspicion to believe there was no white illuminating light was a sufficient basis for the stop, any fact issue regarding the license plate is not material.

I respectfully dissent.

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